

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GERALD C. CARLSON,

Defendant.

CASE NO. CR17-5188RBL

ORDER ON DEFENDANT'S MOTION  
FOR BOND PENDING APPEAL

THIS MATTER is before the Court on Defendant Carlson's renewed Urgent Motion for Release Pending Appeal [Dkt. #61-1, No. 18-30096]. Carlson initially filed his motion in the Ninth Circuit, and that court referred the motion here to consider whether exceptional circumstances for bail pending appeal exist under 81 U.S.C. § 3145(c) [Dkt. #87, No. 18-30096]. The Court has reviewed the materials, including the Declaration of Dr. James Pelton [Dkt. #90]. For the following reasons, the Motion for Release Pending Appeal is DENIED.

**I. FACTS**

Magistrate Judge Creatura entered an order releasing Carlson on bond pending his trial. [Dkt. Nos. 16, 17, 20, 22]. While he was on bond, Carlson committed two violations of the terms of his release. On October 12, 2017, the magistrate judge found that Carlson violated the terms

1 of his bond by using controlled substances. [Dkt. #35]. On December 12, 2017, the magistrate  
2 judge found that he violated the terms of his bond by using alcohol. [Dkt. #37].

3 A jury found Carlson guilty of one count of possessing 50 grams or more of  
4 methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A).  
5 The jury also found Carlson guilty of possessing a firearm in furtherance of a drug-trafficking  
6 crime in violation of 18 U.S.C. § 924(c)(1)(A) and (2). This Court remanded Carlson to custody  
7 immediately after the jury's guilty verdicts. [Dkt. #61].

8 This Court entered judgment and sentenced Carlson to 180 months of imprisonment, the  
9 mandatory minimum sentence applicable to Carlson's offenses. [Dkt. #77]. He has not  
10 previously sought release pending appeal. His sentence on the narcotics count alone was 120  
11 months. [Dkt. #77].

## 12 II. THE MOTION

13 Carlson now moves for release pending appeal. To date, the opening and answering  
14 briefs have been filed with the Ninth Circuit and Carlson's reply brief is due shortly. *See United*  
15 *States v. Carlson*, C.A. No. 18-30096. In his motion, Carlson argues that he has a hip condition  
16 that, together with his congestive heart failure and diabetes, constitutes exceptional  
17 circumstances justifying his release.

## 18 III. ANALYSIS

19 In general, persons convicted of federal crimes are not eligible for release pending appeal  
20 unless a court finds ““(A) by clear and convincing evidence that the person is not likely to flee or  
21 pose a danger to the safety of any other person or the community if released . . . and (B) that the  
22 appeal is not for the purpose of delay, *and* raises a substantial question of law or fact likely to  
23 result in (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of  
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1 imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time  
2 already served plus the expected duration of the appeal process.” *United States v. Garcia*, 340  
3 F.3d 1013, 1015 (9th Cir. 2003) (emphasis added) (quoting 18 U.S.C. § 3143(b)(1)). “A  
4 substantial question is ‘fairly debatable,’ or ‘fairly doubtful.’” *United States v. Handy*, 761 F.2d  
5 1279, 1283 (9th Cir. 1985) (internal citations omitted) (substantial question must be “one of  
6 more substance than would be necessary to a finding that it was not frivolous.”) (quotation  
7 omitted).

8       Thus, while a defendant is presumptively entitled to release before trial, Congress,  
9 through Section 3143(b), presumes detention *after* an adjudication of guilt. Quoting the  
10 legislative history, the Second Circuit has explained that, “[o]nce guilt . . . has been  
11 established[,] there is no reason to favor release pending imposition of sentence or appeal.’ . . .  
12 [T]he government [has a] strong and obvious . . . interest in detaining defendants who have been  
13 found guilty beyond a reasonable doubt of serious crimes: such detention promotes public safety  
14 by removing a presumptively dangerous person from the community; it also encourages general  
15 respect for the law by signaling that a guilty person will not be able to avoid or delay imposition  
16 and service of the sentence prescribed by law.” *United States v. Abuhamra*, 389 F.3d 309, 319-  
17 320 (2d Cir. 2004) (*quoting* S. Rep. No. 225, 98th Cong., 1st Sess. 26 (1983)).

18       More importantly, for defendants like Carlson, who have been convicted of narcotics  
19 offenses that carry a maximum penalty of ten years or more of imprisonment, detention  
20 following a guilty verdict is mandatory. *See* 18 U.S.C. § 3143(b)(2) and 18 U.S.C. §  
21 3142(f)(1)(C). Such defendants are only eligible for bond pending appeal if, in addition to the  
22 showing required under 18 U.S.C. § 3143(b)(1), the defendant also “clearly show[s]” that  
23 “exceptional reasons” justify release pending appeal. 18 U.S.C. § 3145(c); *see also Garcia*, 340  
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1 F.3d at 1015 (“exceptional reasons” requirement is “an additional condition” imposed by §  
2 3145(c)); *United States v. Larue*, 478 F.3d 924, 925 (8th Cir. 2007) (“the *only* possible avenue of  
3 post-trial release would be the showing of the existence of ‘exceptional reasons why [his]  
4 detention would *not* be appropriate’”) (emphasis added) (quoting § 3145(c)).

5 Carlson has not met either the general standard or the one that applies to defendants who  
6 have been convicted of serious drug offenses. He has not met the general standard because he  
7 cannot satisfy the general test for bond pending appeal. He has not shown by clear and  
8 convincing evidence that he is unlikely to pose a danger to the safety of the community in light  
9 of his use of controlled substances when he was released pending trial. While he contends that he  
10 had only minor violations of the terms of his supervised release, his use of controlled substances  
11 is a signal that he remained involved in the drug world, which poses a risk to the community.  
12 Additionally, Section 3145(c) requires a higher showing for serious drug offenses because they  
13 are presumed dangerous to the community.

14 And, given the length of his sentence, Carlson also has incentive to flee. Although he  
15 suffers from medical conditions, this alone will not keep him from fleeing a lengthy period of  
16 incarceration.

17 More importantly, he also cannot show that his appeal is likely to result in an order  
18 reversing his conviction, affording him a new trial, or reducing his sentence. Carlson presses two  
19 issues on appeal, both of which lack merit. His contention that he was denied counsel of his  
20 choosing fails to establish an abuse of discretion because his counsel represented that she was  
21 prepared to go to trial, his motion came at the very last minute, he failed to identify alternative  
22 counsel, and the conflict between Carlson and his counsel was not irreconcilable. Further,  
23 Carlson had incentive to delay the trial and remain free on bond, and the court identified  
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1 scheduling conflicts that meant that granting the motion would have burdened the court's  
2 schedule as well as inconvenienced the government's witnesses and the potential jurors who  
3 were waiting for the trial to begin.

4 Carlson's second contention, that this Court erred in allowing Special Agent Jewell to  
5 testify regarding his experience investigating drug criminals and their use of firearms, lacks  
6 merit. The testimony was short, general, and helped the jury to understand how the items found  
7 in Carlson's home showed that he was a dealer and not merely a well-supplied user.

8 Even if Carlson could meet the general standard for post-conviction release, Carlson's  
9 proffered "exceptional reasons"—his health conditions—fall far short of §3145(c)'s exacting  
10 release standards. The "exceptional reasons" that Carlson sets out in support of his Section  
11 3145(c) claim do not demonstrate that he should be released. Carlson essentially argues that his  
12 health makes prison unusually harsh for him, especially without hip replacement surgery, and  
13 that he should be released so that he can have hip surgery. *United States v. Koon*, 6 F.3d 561, 564  
14 n.8 (9th Cir. 1993) (recognizing that ill health "might" make confinement unduly harsh). But that  
15 is not an exceptional reason. Carlson's evidence that his in-custody medical treatment is  
16 inadequate is scant. The Bureau of Prisons designated Carlson for transfer to the Federal Medical  
17 Center at Rochester months ago, and the Court is informed that the transfer is complete, because  
18 the necessary bed is available.

19 Carlson asks this Court for release to permit a hip surgery but by his own admission such  
20 a surgery could not occur for at least two months because of his doctor's schedule. *See* [Dkt. #88  
21 at 4] (noting that his surgeon is scheduling "two months out"). Carlson's claim that he will die  
22 without hip replacement surgery depends on his assertion that he was scheduled for hip  
23 replacement surgery before he was incarcerated and the surgery was urgently necessary to  
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1 addressing his heart condition and his diabetes. But the records he cites show that his physician  
2 recommended hip replacement surgery because “the patient has failed appropriate non-operative  
3 care” and “would like to proceed with surgical intervention.” [Dkt. #88-1 at 19]. They do not  
4 show that his physician concluded that he would die prematurely without the surgery, or even  
5 that the surgery was actually scheduled. *Id.* at 19, 23. And while he has submitted medical  
6 records, he did not submit any declarations from his doctors regarding the risks that such a  
7 surgery would entail given his other medical conditions and his unwillingness to follow his  
8 doctor’s recommendations.

9 Carlson’s records reflect that he told Bureau of Prisons physicians that he was planning to  
10 have surgery but had been advised by his physician to make some lifestyle changes first. [Dkt.  
11 #88-2 at 6] (Carlson “reported that he was scheduled to have left hip replacement prior to this  
12 incarceration but he had to stop chewing tobacco, eat healthy, and stop using street drugs.”).

13 Dr. Pelton reviewed the Bureau of Prison Electronic Medical Record (BEMR) and was  
14 unable to locate any record suggesting such surgery had been approved by a medical doctor, or  
15 any treating physician. In the opinion of Dr. Pelton, because of his weight, and his severe  
16 cardiomyopathy with low Ejection Fraction, Carlson is currently at a high risk of serious  
17 complications were he to have hip replacement surgery. Should he meet the criteria for hip  
18 replacement surgery and have hip replacement surgery while in the BOP, such surgeries are  
19 typically completed when an inmate is designated to medical centers or other locations with in-  
20 house Physical Therapy, due to the importance of post-operative physical therapy. In-house  
21 Physical Therapy is available at FMC Rochester.

22 Moreover, Dr. Pelton’s review of the BEMR records also indicates his diabetes appears  
23 to be well controlled, as demonstrated in recent labs. Additionally, his review indicates that the  
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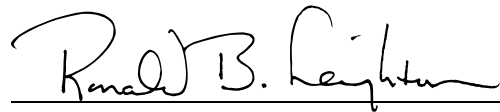
1 past episode of hypoglycemia was not the result of the wrong insulin, but would appear to have  
2 been due to insulin being given and then possibly Carlson not eating after receiving the insulin.

3 Given his move to the Federal Medical Facility in Rochester, Minnesota, there is little  
4 reason now to release him on unsubstantiated assertions.

5 Because Carlson has failed to establish that exceptional reasons justify his release, the  
6 Urgent Motion for Release Pending Appeal is **DENIED**.

7 **IT IS SO ORDERED.**

8 Dated this 16<sup>th</sup> day of May, 2019.

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11 Ronald B. Leighton  
12 United States District Judge  
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